

SON ALLEGING ADULTERINE BASTARDY HELD TO HAVE NO TORT ACTION AGAINST FATHER

Zepeda v. Zepeda

41 Ill. App.2d 240, 190 N.E. 2d 849 (1963)

In an action by a son¹ against his father, it was alleged that defendant willfully and fraudulently induced plaintiff's mother to have sexual relations with him by promising to marry her when in fact, unknown to the mother, defendant was already married. Plaintiff further alleged that due to his subsequent birth as an adulterine bastard he was injured in his person, property, and reputation. He sought damages for the deprivation of his rights to legitimacy, a normal home, a legal father, and inheritance from his father and paternal ancestors; and damages for being stigmatized as a bastard.²

While the Appellate Court of Illinois³ designated the alleged wrong as a tort which caused irreparable injury if legitimation could not take place, it unanimously affirmed an order dismissing the complaint for failure to state a cause of action. The court concluded that to allow redress "could be so far-reaching, that the policy of the State should be declared by the representatives of the people,"⁴ the General Assembly.

Assuming that plaintiff had sustained injuries for which he might otherwise recover, the court considered whether the law would recognize him as having had sufficient existence that a tort could have been inflicted upon him simultaneously with his conception; this interesting question was answered affirmatively. The court noted the judicial trend of the last 20 years to depart from a long followed precedent, *Dietrich v. Inhabitants of Northampton*,⁵ a decision which held that prenatal injuries were not actionable at the instance of the child injured. The test of viability of the foetus at the time of the injury, a test which was developed subsequently to the *Dietrich* case, is also being discarded,⁶ and the court was

¹ The son is a minor suing by his next friend. His age is not revealed in the opinion.

² These factual averments were assumed to be true for purposes of considering a motion to strike the complaint for failure to state a cause of action.

The right to support is not put in issue by the complaint. While paternity would have to be either admitted or proven in a bastardy action to entitle plaintiff either to support or to damages in a tort action, the established right to support is a dissociable cause of action which would be unaffected by recovery in this case, and support will not be given further consideration.

³ *Zepeda v. Zepeda*, 41 Ill. App.2d 240, 190 N.E.2d 849 (1963).

⁴ *Id.* at 263, 190 N.E.2d at 859.

⁵ 138 Mass. 14 (1884).

⁶ For a more complete history of the trend away from the *Dietrich* precedent, including a good compilation of the arguments advanced by the courts both for and against recovery for prenatal injuries, see Annot., 10 A.L.R.2d 1059 (1950), supplemented by Annot., 27 A.L.R.2d 1256 (1953).

willing to hold that a tort might have been inflicted on plaintiff approximately at the moment of his conception. The court concluded that regardless of when plaintiff became a "person" as that word is understood in tort law, when he did, the wrong became an actionable wrong. While this conclusion may not yet represent a generally accepted principle of tort law, the court's analysis is persuasive.

In considering whether defendant had breached a duty toward plaintiff, the court concluded that defendant's act might be considered tortious in that it "was willful and, perhaps, criminal . . . [and] defendant was completely indifferent to the foreseeable consequences of his act."⁷ Defendant's adultery was willful, but the court does not face the question of whether the resultant conception was volitional, or reckless, or only negligent in that an attempt at contraception was made. Plaintiff complains only of his conception, and recovery for negligently caused mental distress is rare, normally, the tort must be intentional. To sustain the complaint defendant must be treated as if he knew that conception would result from his act; *i.e.*, knowledge that conception would result is not an element of the cause of action, and attempted contraception is not a defense. The court's implied presumptions may be defensible in that defendant's intentions would not change the consequences of conception and defendant's adultery is not a privilege to be protected by the law. The essence of the tort, therefore, seems to be that defendant may be charged as a matter of law with knowledge that conception would result, that he knew as an adulterer that he could not legitimize the child, and that he could foresee the stigma which the child would suffer.⁸ Defendant is not absolved by an "illegitimacy-or-nothing" argument to the general effect that he created the life and existence which, *arguendo*, plaintiff would never have had but for the act which plaintiff now calls a tort. Plaintiff did not bargain for life as an adulterine bastard.

The court found that the complaint stated no cause of action for defamation for the reason that "publication" was not alleged. The court further noted the possible availability of "truth" as a complete defense. The law of defamation may, however, help plaintiff to show he has been damaged. Recovery is allowed plaintiffs in defamation cases due to the invasion of their reputations and good names, and the tort may sometimes be closely related to mental suffering.⁹ If the epithet "bastard" is humili-

⁷ *Zepeda v. Zepeda*, *supra* note 3, at 247, 190 N.E.2d at 852.

⁸ Herein plaintiff's mother may be absolved, for she apparently anticipated legitimation through marriage which would have eliminated the stigma. Under other circumstances the question of plaintiff's mother as a defendant might present a problem. The mother, however, is in a better position to assert a parent-child immunity from suit because in her case, unlike this defendant's, an action against her would tend to disrupt a subsisting family unit.

⁹ For example, in *Chiniquy v. Bégin*, 42 Qué. C.S. 261, 7 D.L.R. 65 (1912), *reversed* 46 Qué. C.S. 84, 20 D.L.R. 347 (1914), original judgment *affirmed*, except as to amount of damages 24 Qué. B.R. 294, 24 D.L.R. 687 (1915), the defendant published of a Roman Catholic priest who had renounced his religion and had been

ating and damaging to one falsely accused, then, a fortiori, it must be humiliating and damaging to one to whom it comes with a ring of truth.

The court found that the complaint stated no cause of action for mental suffering for the reason that, while intentionally caused mental suffering is recognized as a tort in Illinois, such a tort was not sufficiently alleged. The allegation most closely approximating mental distress, "His father has wilfully injured and wronged him . . . in stigmatizing him as an adulterine bastard," was held to be inadequate.¹⁰ The court did not suggest how mental suffering might properly be alleged in this case. They did note that "if it did outline such an action, it would be an interesting speculation whether a charge of mental distress and emotional suffering could be made and sustained in behalf of an infant."¹¹ Subsequently, without addressing the question of whether a charge of mental suffering might be sustained on behalf of an infant, the court rhetorically inquired as to how often an illegitimate might try to conceal his parentage and how often he might wince in shame when it is revealed, and they observed that "laws cannot temper the cruelty of those who hurl the epithet 'bastard' nor ease the bitterness in him who hears it, knowing it to be true."¹² It may be assumed, also, that any recovery by plaintiff in this action would include all damages which he might suffer throughout his potential adulthood.

Plaintiff complains that he has no normal home, and the court replies that it cannot give an illegitimate child rights superior to those of a legitimate child. Plaintiff says that he has been deprived of his inheritance from his father and from his paternal ancestors, but it seems reasonable to reply that this is not inherent in his status as a bastard. Society can and does exercise statutory control over the devolution of property. The one injury

legally married and had a child that such a priest was not legally married and the woman was his concubine. While defendant's charges may, perhaps, have been true in terms of church dogma, plaintiff, the priest's daughter, was not a bastard in civil law, and she recovered in an action for libel when the court declared the publication to be insulting, humiliating and damaging in the extreme to the daughter.

¹⁰ *Zepeda v. Zepeda*, *supra* note 3, at 254, 190 N.E.2d at 855.

¹¹ *Ibid.* Two cases involving stigma of a different kind, briefed and argued extensively in the United States Supreme Court, support the answer that charges of mental suffering can be sustained on behalf of an infant. In *Brown v. The Board of Education*, 347 U.S. 483, at 494 (1954), the Court stated of children in segregated grade and high schools: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." In the more recent *Lord's Prayer* cases Mr. Justice Brennan included in his concurring opinion a well documented discussion of the stigma and its effects on young children who might take advantage of the permission given them to leave their classrooms during religious exercises. *Abington School District v. Schempp*, 374 U.S. 203, at 290 (1963) (Mr. Justice Brennan, concurring). The stigma of illegitimacy may differ in kind from the stigma of racial and religious prejudice; the effect on one, especially a child, who is the object of such prejudice is less easily distinguished.

¹² *Zepeda v. Zepeda*, *supra* note 3, at 258, 190 N.E.2d at 857.

of which plaintiff impliedly complains which persuasively demands redress is the mental anguish which he suffers due to society's recognition and treatment of an irretrievable situation—he is an adulterine bastard.

While the court concluded that plaintiff's complaint alleged his injury by a tortious act, a new tort which it characterized as an action for "wrongful life," it affirmed dismissal of the complaint because "the interest of society is so involved, the action needed to redress the tort could be so far-reaching, that the policy of that State should be declared by the representatives of the people."¹³ It was deterred not so much by the potential flood of litigation by illegitimates as by the possibility of similar actions for damages on account of race, color, poverty, hereditary disease, inherited family characteristics, and unsavory reputations of parents. It also noted potential claims arising out of artificial insemination and intentional genetic mutations. None of these hypothetical cases suggested by the court were at issue here. If they did come before the court for decision, most of such claims might be distinguished because, while the child might show injury, other values militate against characterizing the conduct of the parents as tortious; in the case at bar there is neither moral or social justification for allowing the defendant adulterer to procreate by seduction under promise of marriage. Moreover, if complainants in the hypothetical cases which concerned the court were to present meritorious claims, they too should be granted redress.

It is difficult for another reason to accept the court's conclusion that to allow plaintiff's action would be too far-reaching. Inasmuch as new law was made where there once had been a judicial vacuum, the decision itself was in fact far-reaching. The potential consequences of such a decision are illustrated by *Dietrich v. Inhabitants of Northampton*,¹⁴ the leading precedent for the proposition that prenatal injuries were not actionable at the instance of the child, in which the court was influenced by the absence of precedents allowing such actions. It became a precedent which itself inhibited recovery in similar actions for 60 years. The *Zepeda* court may not overcome this objection by arguing that its decision was limited to the particular complaint before it; the far-reaching nature of the decision was its only rationale for denying recovery. Although the court apparently thought that redress was called for, it may have done much to inhibit future recovery in this and similar cases.

The court was concerned about the role of the Illinois General Assembly as representatives of the people. Certainly a decision to allow recovery in this case ought neither to bind nor inhibit the General Assembly. It would be far more likely to give this question the consideration desired by the court had the court's decision been the other way.

¹³ *Id.* at 262-63, 190 N.E.2d at 859.

¹⁴ 138 Mass. 14 (1884).

¹⁵ The absence of contrary precedents, together with the *Dietrich* case, were often cited by subsequent courts who either denied or limited actions for prenatal injuries. See Annot., 10 A.L.R.2d 1059 (1950), supplemented by Annot., 27 A.L.R.2d 1256 (1953).

The apparent aggravated circumstances of this case, the deceit practiced by defendant upon plaintiff's mother, together with the fact that plaintiff was not only born illegitimate, but was an adulterine bastard, make it unlikely that any similar case will present a more persuasive basis for recovery.

